No. 97-623

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

DEKALB COUNTY SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

LINDA SCHRENKO, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

THURBERT E. BAKER
Attorney General of the State of Georgia

JEFF L. MILSTEEN
Deputy Attorney General

DENNIS R. DUNN
Senior Assistant Attorney General

ALFRED L. EVANS, JR.
Senior Assistant Attorney General
(*Counsel of Record*)

Attorneys for Respondents

Please Address All Communications
To *Counsel of Record*:
ALFRED L. EVANS, JR.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
Ph. (404) 656-3389

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the record and decision below can reasonably be said to give rise to the questions sought to be presented by the Petition?

2. Did the Court of Appeals err in concluding that the district court's judgment was in substance based upon what it had found to be a violation of *state law*, thereby causing the judgment to be barred by the Eleventh Amendment as expounded by this Supreme Court in *Pennhurst*?

3. Did the Court of Appeals correctly decide that it would be inconsistent with the Eleventh Amendment and elementary principles of federalism to intrude upon the State's allocation of funding responsibilities between itself and its political subdivisions?

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, State of Georgia, the Hon. Zell Miller, Governor of the State of Georgia, State School Superintendent Linda C. Schrenko, Comptroller General John W. Oxendine, the State Board of Education and its individual members, and the State Department of Education, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 109 F.3d 680 (1997).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents respectfully supplement the listing of constitutional provisions and statutes identified by Petitioners to be involved in the case with the following:

Article III § 2 of the United States Constitution provides in relevant part that:

> "The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to *Controversies* between two or more States; – between a State and Citizens of another State; – between Citizens of different States. . . . " (Emphasis added).

Article IV, § 4 of the United States Constitution provides in relevant part that:

> "The United States shall guarantee to every State in this Union a Republican form of Government. . . . "

The Tenth Amendment to the United States Constitution provides that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Georgia statute cited in the Petition as governing state funding of student transportation also provides in relevant part that:

> "(a) The amount of funds needed by a local unit of administration to pay expenses of student transportation shall be calculated by the State Board of Education in accordance with a schedule of standard transportation costs to be incurred by local units of administration in the operation of economical and efficient student transportation programs and a schedule of variable circumstances which affect, in varying ways, the cost of student transportation authorized by this Code section; provided, however, that the amount of funds to be actually distributed to any local unit of administration under this Code section during any school year shall not exceed the actual costs incurred by the local unit in transporting students to and from public schools, including costs for transportation for disabled or limited-English-proficient students who must travel across local school system lines or away from the school to which they would

normally be assigned if they did not have such special needs. It is further provided that the costs of the regular student transportation program receive full funding before funds are provided for transportation of students to and from places for the purpose of work experiences, training in instructional laboratories outside the assigned schools, and in other such field trips required of or integral to the various instructional components of the educational program. *In establishing the schedule of standards and variable student transportation costs or cost factors, the state board is, without limiting the generality of the foregoing, authorized to consider factors and circumstances such as the number and density of students transported in the local unit of administration and the areas therein served by school buses; the suitability of school bus routes in the local unit; the number of miles traveled by school buses in the local unit; minimum bus loads; transportation surveys, cost of transportation equipment, and depreciation schedules. . . .* "

O.C.G.A. § 20-2-188(a) (emphasis added).

STATEMENT OF THE CASE

As the Court of Appeals aptly observed, this case is in essence a claim for additional funding by a political subdivision of a state (DeKalb County) against its creator (the State of Georgia) to recoup some of the added pupil transportation costs the county has incurred in connection with its recently concluded 27-year school desegregation suit. *Appendix to Petition* (henceforth *Appendix*), p. 18a. As the Court of Appeals put it:

> "[T]his case is simply about who will pay for the measures undertaken by DeKalb to remedy the effects of past segregation on its public schools, the taxpayers of DeKalb County alone or the taxpayers of the state as a whole." *Ibid.*

A. The Prior Desegregation Litigation *Against* DeKalb County

The underlying school desegregation litigation upon which DeKalb County's present contribution claim for pupil transportation is based, reviewed by this Supreme Court of the United States in *Freeman v. Pitts,* 503 U.S. 467 (1992), has been sufficiently summarized for the purposes of the instant Petition for Certiorari in the Court of Appeals' decision at pp. 3a to 7a of the *Appendix,* which is incorporated by reference. The State of Georgia was never a party to DeKalb's underlying desegregation litigation. Moreover, as to the area or activity for which DeKalb seeks both reimbursement for its *past* expenditures and injunctive relief to require the State to help fund its initiatives *in the future,* specifically pupil transportation, DeKalb was found by the district court to be "unitary" in June 1988, over two years *before* DeKalb County filed its instant 1990 complaint against the State, its governor, and other state agency and official Respondents. DeKalb was found to be "unitary" in all respects and released from court supervision in 1996. *Mills v. Freeman,* 942 F.Supp. 1449 (N.D. Ga 1996).

B. DeKalb's Present Compensatory Litigation Against the State[1]

The Court of Appeals' summarization of the proceedings in the district court in this case, which appears at pp. 8a to 13a of the Petition's *Appendix*, is also adopted by reference. Respondents believe, however, that it might be useful to the Court to have a somewhat more detailed review of the funding of public education in Georgia both generally, and with specific reference to pupil transportation. We do this in the following sections of our Statement of the Case.

C. School Funding in General

Public education has long been recognized by both federal and State courts to be a function of county government in Georgia.[2] As noted in *Armour v. Nix*, N.D. Ga., No. 16708 (3-Judge Dist. Ct.), Order of Sep. 24, 1979, *aff'd*, 446 U.S. 930, *reh'g denied*, 448 U.S. 908 (1980), Georgia's county organization of itself tends to mitigate the extreme

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[1] The Court of Appeals recognized that:

> "While a number of state officials are named as defendants in this case in addition to the State of Georgia and its agencies, it is obvious that this is, in reality, a suit against the State itself." *Appendix*, p. 21a.

[2] Municipal school districts existing as of the time of adoption of Georgia's 1945 Constitution (for example, the City of Atlanta's school system) have been permitted to continue, but essentially at sufferance. The creation of any new municipal system is constitutionally prohibited, and under Georgia's so-called "hara-kiri" law, O.C.G.A. § 20-2-370, the citizens of a municipality may vote their independent school system out of existence and into the county system *sans* county approval.

inter-district wealth variations (in terms of their equalized adjusted school property tax digests) which are sometimes found in the micro school district organization of other states. *Cf. San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 15 (1973). Georgia has, on the other hand, long extended massive fiscal assistance to the counties in support of their respective school systems. In order to further ameliorate county-to-county wealth differentials, Georgia in its successive foundation programs for the funding of public education, has, since at least its Minimum Foundation Program of Education Act (MFPE), in 1964, Ga. L. 1964, pp. 3-49, allocated State and county funding responsibilities respecting the programs and activities funded under the State assistance program according to the relative wealth of the counties in terms of their equalized adjusted school property tax digests. The current funding enactment, Georgia's "Quality Basic Education Act of 1985" (O.C.G.A. §§ 20-2-130 to 20-2-322.1) or "QBE" provides for additional "power equalization grants" to help the poorest counties of the State in terms of their equalized adjusted school property tax digests. *See* O.C.G.A. §§ 20-2-164 and 20-2-165. In the case of DeKalb County, an affluent suburban county, the percentage of its *total* school budget funded by the State was 41% in 1993.

The State's foundation programs have, on the other hand, always been limited. It has never been the design or intent of the State of Georgia to extend fiscal support for everything that county government does in public education. QBE, as its predecessor state funding enactments, provides *partial* funding to counties *solely with respect to certain basic or core areas, activities and programs of*

a county's overall educational efforts, namely, those activities and programs provided for in the funding enactment. The costs of the many and varied educational activities which counties routinely engage in outside the scope and limitations of QBE funding, however educationally beneficial or desirable, are *not* paid by the State. They are paid for by *county* funds. Since State funding under QBE is on the basis of a 180-day school year, a county providing for an extended school year or summer program has historically been required to fund the program itself. That a county may be required to undertake activities or programs unfunded by the state financial assistance program in order to comply with the mandates of federal law or a federal or State court order (as opposed to acting voluntarily) makes no difference – it does not change State law or affect the scope or limitations of QBE funding.

D. Pupil Transportation Funding

There are a number of approaches the State of Georgia could have taken in connection with the costs counties incur in operating their pupil transportation systems. As in the case of public education generally, it is the *county* which exercises plenary operational control over pupil transportation. The school buses are owned by the county and the bus drivers are county employees. How many buses a county will buy and maintain is strictly up to the county. The same is true of the critical "usage" questions of when, where, and under what circumstances (e.g., field trips, intra-facility transport during school hour and extra-curricular activities) the county's buses will be used to transport pupils. In attempting to allot a limited legislative appropriation to 159 counties and

some 20 cities on a fair and equitable (as well as economical) state-wide basis, it has never been the State's design or intent to help fund all that counties do in the area of pupil transportation any more than in public education generally.

The State could, of course, have left the entire funding burden for pupil transportation to the counties. Similarly, it could have, had it chosen to do so, allotted available state fiscal aid on a simple "head count" basis, in other words, a flat dollar grant per transported child. It indeed appears that in the 1950s, the General Assembly did *legislatively* allocate State Pupil Transportation Funds based upon the "number" of pupils transported multiplied by varying density factors. *See* Ga. L. 1957, pp. 380-384.

Since enactment of the Minimum Foundation Program Education Act (MFPE) in January 1964, however, Georgia has chosen to use a "transportation survey" system to determine each county's fair share of the total State funds available pupil transportation. The MFPE Act vested Georgia's State Board of Education with the responsibility of developing a schedule of both standard and variable cost factors to provide an "economical and efficient" funding program for pupil transportation. Ga. L. 1964, pp. 3, 16. The Act specifically authorized the State Board of Education to consider, *inter alia*:

> "[T]he number of and density of pupil transported in the local unit, and *the areas therein served by school buses, suitability of school bus routes* in the local unit, the suitability of the type and number of buses used by the local unit, the number of miles traveled *by school buses* in the

> local unit, minimum bus loads, *transportation surveys, . . . and such other facts and circumstances as the Board may find to be relevant for the purpose of establishing such schedules and cost factors.* Ga. L. 1964, pp. 3, 17 (emphasis added).

This authority and mandate has been continued in substantially the same language in successive funding enactments, appearing in QBE today. O.C.G.A. § 20-2-188(a).

The funding program developed by the State Board of Education under MFPE, also essentially unchanged since 1964, is an *attendance area based routing survey*, which is "scheduled" to be conducted on a triennial basis. The mechanics of Georgia's routing survey *are for funding purposes only*. All parties agree that the State's "routing" has absolutely nothing to do with where a county in its discretion decides to route and actually run the buses it owns and operates. As both county and state school officials testified, the process starts with the county submitting a large survey map or maps to the State Department of Education. DeKalb submits three maps, one each for its elementary, junior high and high schools. On the map (or maps), the county shows the boundaries it (i.e., *the county*) has determined for its *school attendance zones*, as well as the location of the school which it (i.e., *the county)* has designated to serve the children living within that attendance area. A county also indicates on the map where the children in the attendance area live or where they are to be picked up, DeKalb using dots to locate its bus stops, giving the number of children who will be picked up at each stop.

From the map (or maps) and accompanying data received from the county, the State Department of Education's Transportation Section designs *for State funding purposes only*, an *idealized* routing plan based upon what is conceptually possible in terms of maximum dollar economy and efficiency, striving for the *lowest possible number of bus route miles* (not pupil miles) in getting children *to and from their school safely*. Under this funding program State aid has been historically limited to the core package of two trips a day, in other words "to and from" school. All other routine county usage of school buses, such as day trips, field trips, extra-curricular activities, or intra-facility travel, has historically been at county expense.

The State Department of Education uses an instrument to measure the mileage of its *idealized* or conceptually possible routing plan for the county. From this and other county-supplied data, the State Board of Education makes two critical funding calculations. One is the number of buses needed to carry out the State Board's *idealized* routing survey, the other is the *bus route* miles in that hypothetical routing plan. These determinations are arrived at through the application of more complex computations and formulae which are not here relevant (including, for example, the size and number of buses in the county's existing fleet, the number and length of the *idealized* county bus routes under the State Department's routing plan, the number of buses needed to serve these routes in an hour and a half time frame, and differing state-wide categories respecting anticipated operational and maintenance costs). These two determinations are in turn used to calculate funding allotments for such things as drivers' salaries, insurance and replacement costs (all

based upon the number of buses needed under the State Board's survey calculations), and the county's projected operation and maintenance costs for such things as fuel, routine maintenance and repairs (all are based upon the county's bus route mileage).

E. Why "M-to-M" and "Magnet School" Transportation Programs Are Outside The Scope of the State Funding Program

The *attendance area* based routing survey which Georgia uses to allocate state funds to counties in support of their pupil transportation systems came into existence at least 33 years ago when the State Department of Education adopted its funding procedures to implement the January 1964 MFPE Act. The format was, of course, perfectly attuned to the fact that this is the way in which county school officials at the time uniformly assigned children to a school, and continues to be the way in which the great majority of children, including those residing in DeKalb County, are assigned to a school today. Of the approximately 79,000 students in DeKalb's 77 elementary and 18 high schools in 1992, only 6,251 (about 9%) were participants in "M-to-M" or "Magnet" programs.

The *attendance area* basis of the routing survey is also reflective of the *mass pupil transportation approach* which the State Board has always followed in its funding calculations. As the Southern District Court explained in the companion *Savannah/Chatham County* litigation, children who participate in "M-to-M" or "Magnet" school programs and consequently do not attend their normal

residential area school "must head in different directions to school; they cannot ride the same bus to their common school," with pupil transportation for these children accordingly being more "costly" because it is *more individualized. The Board of Public Education for the city of Savannah and the County of Chatham v. State of Georgia*, S.D. Ga. No. 490-101, (henceforth *Savannah/Chatham County)*, Order of Aug. 11, 1992, p. 11.[3]

Historically, when an individual pupil was permitted, typically upon parental request, to attend a school other than the school to which he was "assigned" by virtue of his residential area, he was outside of the pupil transportation scheme altogether; it was up to his parents to arrange for the child's transport. Consequently, when DeKalb County, voluntarily implemented a limited "M-to-M" program around 1975, it did not provide transportation for children electing to participate. It was not until 1978 that DeKalb, under court order, began to provide pupil transportation for its "M-to-M" programs.

The State, since these costs were plainly outside the scope of the core area of pupil transportation costs it funded (i.e., a county's transportation needs calculated for transport to and from their normal residential area *en masse*, i.e., with utilization requirements and the fewest and shortest bus routes conceptually possible), initially excluded "M-to-M" and "Magnet" students from their calculations altogether. As pupil transportation costs for "M-to-M" and "Magnet" programs began to increase in

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[3] The Northern and Southern District litigation involved the same lead counsel and was in large measure based upon the same documentary evidence and deposition testimony.

the mid-80s, however, the State Board of Education, in an attempt to be of at least some assistance without abandoning its long-standing and well-functioning overall system of QBE funding, made a policy change. It advised counties in January 1986, that instead of wholly excluding "M-to-M" and "Magnet" students attending schools other than that to which they were assigned by virtue of their residential area (the historical practice), the State Board would for the 1986-87 school year and thereafter include those students in funding calculations through a fictional device. "M-to-M" and "Magnet" pupils were counted for funding purposes "as if" they were going to their normal attendance area school. This resulted, at least in part, in DeKalb's allocation of funding for twelve additional buses from the State in 1987.

Additionally, following commencement of the litigation, the State Board of Education directed its transportation staff to explore the possibility of developing a new funding system which could be used to extend funding assistance for "M-to-M" and "Magnet" programs on a state-wide basis. The end result, although it could more expansively be described in terms of possibilities and problems, was described by the Southern District in the companion *Savannah/Chatham County* litigation as follows:

> "In response to this litigation, in January 1991, the State Board . . . carefully considered numerous alternative measures of calculating transportation funding. In the end, however, the State could not devise a plan to aid systems such [as] Savannah-Chatham County without harming other systems, or, under some proposals, harming Savannah-Chatham County."

Savannah/Chatham County, Order of Aug. 27, 1993, p. 13.

The staff found that some approaches, such as a simple "head count" might help the urban and suburban school districts involved in "M-to-M" and "Magnet" school transportation, but would have a devastating impact upon the poorer, rural school districts. Along the same line, the Court of Appeals recognized that the result of the State's compliance with its state funding statute as interpreted by the district court as opposed to continuing the way in which it had been construing its own statute for over 30 years:

> "will not be any enhancement of the desegregation programs in DeKalb County, which are already being funded by DeKalb as the Constitution requires, but rather a reallocation of resources from poorer, rural school districts to a wealthier suburban district." *Appendix*, p. 20a.

In essence the problem is simply that the State's current funding system, since it is calculated according to an *attendance area* based routing survey which is scheduled to be conducted every three years, cannot be adopted to "M-to-M" and "Magnet" programs without a complete restructuring of the current funding system based upon *mass* transportation concepts, such as the use of *bus route miles* (not pupil miles), "deadhead" mileage excluded, and bus utilization a factor (the State Department of Education will not allot a bus for fewer than 25 students), and substituting a more *individualized* plan in its place.

Pupil transportation officials of DeKalb County and the State agreed that the funding of "M-to-M" and "Magnet" school transportation was incompatible with the existing *attendance area* based routing survey format which the State had been using for over 30 years. DeKalb County's Executive Director of Transportation testified that the State's long pre-existing funding system could not be adopted to "M-to-M" or "Magnet" programs, because:

> "There is no way that it [the bus] can pick up that child, M – M and carry it and still accommodate the routes and services in the neighborhood so *it has to be a totally separate routing system.*" (Emphasis and bracketed matter added).

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the Record gives rise to the "Questions Presented" by the Petition.

DeKalb's Petition presents two questions. Both are based upon the same faulty postulate. The postulate is that *racial discrimination* exists in the method used by the State, through its school officials, to allocate State transportation funds to DeKalb County in support of its pupil transportation system. This is not so! There is nothing in the record, or decision below, to support the premise that the triennial attendance area based routing surveys which Georgia has used since 1964 to fund pupil transportation has had any adverse racial impact on the county's pupil transportation program. The district court opined on two separate occasions that Georgia's transportation program

was *not* a vestige of the dual school system, and that Georgia had not violated the Equal Educational Opportunities Act of 1974 (EEOA), 20 USC § 1703(b), in its allocation of pupil transportation funds. *Appendix*, pp. 35a, 61a. Opining further that the record in the case did not show that the State of Georgia was currently a participant in any constitutional violation (*Appendix*, p. 63a), the district court concluded:

> "No segregative acts by the state are shown to have at any time prevented, delayed, or hindered any of DeKalb County's either initial voluntary efforts commencing in 1963 or any of the court-ordered steps subsequently required of DeKalb County to achieve the desegregation of its schools." *Appendix*, p. 70a.

The Court of Appeals took note of the fact that the district court had specifically included Dekalb's "M-to-M" and "Magnet" programs in its conclusion. *Appendix*, p. 11a. According to the district court:

> "There is no evidence before the court to suggest that DeKalb's M-to-M or Magnet programs were ever hindered or interfered with by the state or state officials in their initial voluntary forms or in their judicially modified forms." *Appendix*, p. 54a.

DeKalb County has never suggested that it was in any way prevented, hindered or delayed as to so much as a single program it wanted because of any contended funding inadequacy on the part of the State. The County had become "unitary" in the relevant areas of pupil transportation and student assignments two years before the instant action was initiated, a fact which the Court of

Appeals held to be a bar of prospective relief in and of itself. *Appendix,* pp. 24a-25a.

The nub of Dekalb County's erroneous postulate concerning the existence of "racial discrimination" in the method used by state school officials to calculate its share of pupil transportation funds appears to lie in its erroneous assertion that when the suit was filed in 1990, the school bus mileage calculations under the State's funding program *"were governed by a policy of the State Board of Education identified as ED(1)G." Petition,* pp. 4-5. Petitioners correctly quote the relevant part of the "policy" as providing that:

> "Pupil transportation funds shall be calculated on the basis of the school having available space in the pupil's grade level *nearest the pupil's place of residence." Petition,* p. 5 (emphasis by Petitioners).

It also appears that the district court accepted DeKalb's argument that ED(1)G affected the State Department of Education's allotment calculations by restricting State funding to "neighborhood" school-based assignments. *Appendix,* pp. 45a-47a.

The Policy ED(1)G Irrelevancy

The idea that the State Department of Education's mileage calculations under the triennial attendance area based routing survey funding program "were governed

by" ED(1)G is contrary to all of the evidence and wrong.[4] Respondents have never disputed the district court's "step one" finding that ED(1)G was adopted by the State Board of Education in 1972, a time when there was considerable controversy over "busing" plans ("pairing" plans, for example) as a tool for further school desegregation. *Appendix*, pp. 46a-47a. The controversy was particularly acute in Georgia respecting the Savannah/Chatham County School System where an extensive "pairing" plan, with large scale busing of children to distant schools within the city and county, had been ordered. *Id.* at 47a. A number of anti-busing resolutions were passed by the State Board during the same time period, and there is no question but that Policy ED(1)G was the Board's way of speaking out and taking a position on a matter of public controversy. In this case, as well as in the companion *Savannah/Chatham County* Litigation, both district courts reasonably viewed the Policy

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[4] The statement on p. 4 of the Petition that for everyone except "M-to-M" and "Magnet" students, the State's mileage calculation is based upon where the student actually attends school (referred to by Petitioners as the student's *actual* school assignment), is misleading. The implied singling out of students in these programs for disparate treatment is untrue. Under the triennially conducted *residential area based* routing survey funding program *all* students who elect to attend a school other than that designated by the county to serve their residential area are beyond the scope of what the state funds (i.e., *mass* rather than an *individualized* format of pupil transportation), and consequently excluded from the State's funding calculations. This same limitation on the scope of State funding applies, for example, to students who for their own or parental convenience are permitted to attend a school other than that to which they are geographically assigned.

as one which had been adopted with "discriminatory intent." *Appendix*, 58a; *Savannah/Chatham County*, Order of Aug. 27, 1993, pp. 18-19.

But that is where the matter ended. There was no "step two." ED(1)G never had anything to do with the actual mechanics of calculating funding allotments. The allotments to DeKalb County, as all other counties, continued to be calculated in precisely the same manner in which they always had been calculated under the residential area based routing surveys. The State Department of Education's Director of Pupil Transportation's testimony was that Policy ED(1)G was rhetorical only, and together with the Board's various anti-busing resolutions, expressed the Board's opposition to the mandatory long-distance busing of students. According to the Director's uncontroverted testimony, ED(1)G never affected the flow of so much as a single dollar of the State Department of Education's funding calculations. The Director pointed out that in reality the lack of impact of ED(1)G could not have been otherwise. The drawing of attendance areas, designation of the schools to serve these areas, not to mention "space availability" determinations and decisions as to which school would have a particular "grade level," were all strictly *county* determinations.

Additionally, it is undisputed that the residential area and school designated by the county to serve it did not have to be contiguous. The residential area based funding format did not, as the district court erroneously thought, limit funding to "neighborhood schools." This is shown by undisputed physical evidence that the long distance busing involved in "pairing" and other desegregation plans was in fact funded by the State under the same

residential area routing survey funding procedures it had always used. As the district court explained in the companion Savannah/Chatham County litigation:

> "[S]ome of the district's pairing plans paired non-continuous zones, where students in one geographical area were assigned to a particular zone that was not their residential zone. Accordingly, under these plans, which the State funded, students were bused not only beyond their neighborhood schools but to a paired zone outside their residential area.
>
> Furthermore, despite the State's citation to the ED(1)G in 1988, when it denied Savannah-Chatham County additional funds for transportation under the system's new plan, evidence indicates that no change occurred at that time in the State's approach to pupil transportation in Savannah-Chatham County. That is, the State continued to fund Savannah-Chatham County pupil transportation essentially in the way it had always funded it, and systems across the state, since at least the late 1960s. Consequently, because the Plaintiffs have presented no evidence that the State actually adhered to or implemented rule ED(1)G for the years during which they seek relief, namely, from 1988 forward, the Court finds that *they have failed to demonstrate a discriminatory impact or effect.* The Court therefore finds no Fourteenth Amendment violation exists." *Savannah/Chatham County*, Order of Aug. 27, 1993, pp. 21-22. (Emphasis added).

The Southern District specifically found respecting Title VI that:

> "The Plaintiffs point to no evidence indicating that the State's policy has caused or contributed to segregation in Savannah-Chatham County schools or in any school system in the State. That is, there is no evidence that the State's policy has caused Savannah-Chatham County, or any other system to alter their desegregation policies in such a way as to lead to greater segregation in any of the state's schools. Absent any evidence of an actual segregative effect or any racial motivation, the Court finds that the State's policy does not violate the regulations pursuant to Title VI."[5] *Savannah/Chatham County*, Order of Aug. 27, 1993, p. 30.

In contrasting the State's funding of Savannah/Chatham County's extensive "busing" of pupils to distant schools under the school system's "pairing" plan with the non-funding of its subsequently implemented "M-to-M" and "Magnet" programs, the district court explained in another Order that:

> "[U]nder the 1971 pairing plan the Local Board did not assign only a few students to a school far from their home. Instead, an entire bus load

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[5] The Savannah Court noted of the basic attendance area based routing survey concept that it was not formulated with an eye toward the dual system, and to the contrary had been utilized in many instances to further and fund integration in the State since requiring districts to draw attendance areas and largely funding transportation only within these areas discouraged the use of some freedom of choice plans. *Savannah/Chatham*, Order of Aug. 27, 1993, pp. 23-24.

of students rode the bus together from a common neighborhood to a single school far away.

> Under the 1988 magnet plan, transportation is more costly because the plan is more individualized. Each magnet program receives students from all over the school district. Because of the geographical distribution of students, the magnet program students can not ride the same bus to their common school. . . . " *Savannah/Chatham County*, Order of Aug. 11, 1992, p. 11.

Examined carefully, the district court in the instant case, while attributing a "step two" discriminatory *effect* to Policy ED(1)G, did so only *in the general speculative sense that because of its likely detrimental impact* on desegregative busing, the Policy "must have had a discriminatory effect" *somewhere*. *Appendix*, p. 59a. But where? The court here, as well as where it said that ED(1)G "clearly served to deter local school district[s] from transporting a student to any school other than that nearest the student's residence" (*Appendix*, pp. 59a-60a, emphasis of plural added), was plainly *not* talking about DeKalb County. As to DeKalb County, the Court expressly found that there was no evidence to suggest that DeKalb's M-to-M or Magnet programs were ever hindered or interfered with by the State.

The Petition should be dismissed in the first instance, because neither the decision below nor the record gives rise to the questions which DeKalb seeks to present to this Honorable Court for review.

2. The Court of Appeals correctly concluded that looking at the substance of the district court's judgment, it appeared to be one for the violation of *state law*, therefore barred by the Eleventh Amendment as expounded by this Honorable Supreme Court in *Pennhurst*.

The Court of Appeals concluded that as far as DeKalb's pupil transportation funding claim is concerned:

> "the gravamen of its complaint appears to be that the State has improperly interpreted and failed to adhere to a state statute governing reimbursement for transportation costs." *Appendix*, 15a.

It further concluded that:

> "Looking at substance of the district court's judgment, it appears to be one for violation of state law, a holding barred by the Eleventh Amendment." [citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984)]. *Appendix*, 15a-16a.

The Court of Appeals' conclusions are strongly supported by the evidence. In its initial Order of September 23, 1984, the district court granted injunctive relief requiring the State to henceforth construe State Law in accordance with its (i.e., the district court's) interpretation of the disputed state statute, O.C.G.A. § 20-2-188. The district court repeatedly explained the *state law* basis of its judgment as follows:

> "*[S]ince the SDE has violated State Law*, the local district is entitled to be paid the transportation funds that have been wrongfully withheld since

> the implementation of M-to-M and Magnet programs." *Appendix*, p. 57a. (Emphasis added).
>
> "*State Law* authorizes reimbursement for transportation." *Appendix*, 73a. (Emphasis added).
>
> " . . . the district's actual cost for transportation during that period being $34,726,764. Of this total amount $25,372,748 *should have been paid pursuant to state law*. The state has already paid the district $740,397. Thus the court hereby finds for the DeKalb County School District in the amount of $24,632,651." *Appendix*, pp. 73a-74a. (Emphasis added).
>
> "The court finds *the state* liable *to DeKalb County* for the $24,632,351 *in transportation monies that should have been paid pursuant to state law.*" *Appendix*, 74a. (Emphasis added).

Upon the state's motion to reconsider, alter or amend the judgment, the district court "clarified" its prior order by attempting to posit its award of damages on Title VI rather than state law. The state law violation it perceived was on "reconsideration" described by the district court as used solely to determine the appropriate measure of damages. The district court continued, on the other hand, to expressly base its injunctive relief, at least in part, upon the state statute. *Appendix*, p. 34a. The Court of Appeals, in concluding that the judgment of the district court was in substance still based upon a violation of state law and hence barred by the Eleventh Amendment, noted that it remained uncontroverted that "the damages awarded to DeKalb in this case was measured by application of the disputed Georgia statutory provision." *Appendix*, p. 15a.

Another problem with the district court's attempt to base its award of relief on Title VI, is that in law and in fact this is not a legitimate Title VI case. Title VI is directed to discrimination based upon grounds of "race, color or national origin." 42 U.S. § 2000d. But as the Court of Appeals correctly observed, the case is not about the "civil rights" of persons under Title VI; it is about money! *Appendix*, p. 18a. It is about whether DeKalb County has a right of contribution against the State to help defray the additional pupil transportation costs DeKalb has incurred in an entirely different suit, since ended, which did involve the sort of "civil rights" interests which are protected by Title VI. DeKalb County was the defendant and adjudicated wrong-doer in that case, a case to which the State was never a party. The Court of Appeals explained:

> "[T]his case is simply about who will pay for the measures undertaken by DeKalb to remedy the effects of past segregation of its public schools, the tax-payers of DeKalb County alone or the tax-payers of the State as a whole. *Appendix*, 18a.

Even overlooking the fact that Title VI by its very nature and purpose is not an appropriate vehicle for this state-law-centered controversy about the amount of money DeKalb County should have received from the State for pupil transportation, the county's Title VI claim, as the Court of Appeals correctly held, is also *jurisdictionally* barred by the "standing" requirements of Article III of the United States Constitution. *Appendix*, p. 15a.

Title VI protects "minorities" (seemingly meaning *individuals* or *persons*) against discrimination on the stated grounds. *See, Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582, 590 (1983).

DeKalb County manifestly is not a "minority" (in the sense of being an "individual" or "person") for purposes of Title VI protection. It has never been suggested that the County had been denied anything at the hands of the State on the ground of its or its school board's racial or national origin composition. We respectfully submit that the Eleventh Circuit's conclusion that "standing" does not exist is sound law for the reason stated in *United States v. State of Alabama*, 791 F.2d 1450, 1456-1457 (11th Cir. 1986):

> "Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a 'person' with rights under this statute. . . . [T]he Supreme Court has implicitly recognized a right of action for *individuals* injured by a Title VI violation. Absent any indication of Congressional intent to grant additional rights under this statute to non-private state subdivisions against state itself, we decline to infer such a right of action by judicial fiat."

We believe the Eleventh Circuit rule is consistent with this Supreme Court's repeated admonition that "waivers" and congressional "abrogations" of a state's Eleventh Amendment immunity from suit are to be strictly construed in favor of the immunity and against its waiver or abrogation, *e.g.*, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240-241, 243 (1985).

The individual petitioners in the case are "window dressing" parties only. As the Court of Appeals pointed out, no discrete relief was ever sought on their behalf in the case, and certainly none has ever been awarded. All of their "Title VI" interests have been constitutionally

satisfied in the separate school desegregation litigation where DeKalb County was the defendant. As the Court of Appeals observed, these individuals have no injury at all which could be remedied by the invocation of Title VI. The same *want of injury* is also fatal to the existence of Article III jurisdiction. *E.g., Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). In sum, the essentially state-law judgment of the district court cannot be saved by positing it on Title VI. To use football terminology, Title VI is an "ineligible receiver."

3. The Court of Appeals correctly held that it would be inconsistent with the Eleventh Amendment and elementary principles of federalism to intrude upon a state's allocation of funding responsibility between itself and its political subdivisions.

This case goes to a core concept of state government's existence. It involves a state's fundamental right of autonomy, *qua* "statehood," to create political subdivisions, and to fulfill its design and purpose in their creation by allocating governmental powers, responsibilities *and funding obligations* between itself and its political subdivisions. This is not a case where some counties are being treated differently from others with respect to the State's funding program. Georgia's residential-area-based routing survey procedures are applied on a uniform statewide basis to all of the State's counties and cities which operate pupil transportation systems. The Court of Appeals correctly concluded that DeKalb's suit to shift the burden for some of the costs of its desegregation measures to the State and, by extension, to the State's taxpayers-at-large, would be an unfathomable intrusion

into the State's affairs and a violation of the most basic notions of federalism as well as the Eleventh Amendment. *Appendix*, p. 19a. We think the proposition to be self-evident. As far as we are aware, the Eleventh Circuit's view is in accord with each of the other Circuits (i.e., the Fourth, Fifth and Sixth Circuits) which have looked at the matter in this context. *See, Stanley v. Darlington County School District*, 84 F.3d 707, 716-717 (4th Cir. 1996); *Kelley v. Metropolitan County Board of Education of Nashville & Davidson County*, 836 F.2d 986, 995-998 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988); *United States v. Texas Education Agency*, 790 F.2d 1262, 1265 (5th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987); *see also, Harris v. Angelina County, Texas*, 31 F.3d 331, 340 (5th Cir. 1994); *Accord, San Antonio Independent School District v. Rodriguez*, 441 U.S. 1, 40 (1973).

We would respectfully submit, that the critical import of this issue to a state's very existence as sovereign causes this fundamental right *qua* "statehood" to be protected not only by the Eleventh Amendment and elementary principles of federalism, but also by the Tenth Amendment as a fundamental ingredient of state sovereignty which has not been delegated to the United States or prohibited to the states by the United States Constitution, and by the "republican form of government" guarantee of Article IV, § 4 of our Constitution. *See, Kelley v. Board of Education of Nashville and Davidson County*, 836 F.2d 986, 995-997, 1000 (6th Cir. 1988), *cert. denied*, 487 U.S. 1206 (1988). As the Sixth Circuit opined in the strikingly similar factual setting involved in *Kelley*:

> "The promise of self governance would prove hollow indeed if the right to a meaningful and

effective vote were to be manipulated out of existence through the judiciary itself, through a decision tending to debase the people's vote by shifting the legislative power from a body the people can vote for to one they can not vote for." *Id.* at p. 997.

CONCLUSION

For all the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THURBERT E. BAKER
Attorney General

JEFF L. MILSTEEN
Deputy Attorney General

DENNIS R. DUNN
Senior Assistant Attorney General

ALFRED L. EVANS, JR.
Senior Assistant Attorney General
(Counsel of Record)

Attorneys for Respondents

Please Address All
Communications To:

ALFRED L. EVANS, JR.
Senior Assistant Attorney General
40 Capitol Square, S. W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-3389